IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-478

PARKER SEAL COMPANY, *Petitioner*
v.
PAUL CUMMINS, *Respondent*

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR PETITIONER

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BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (Pet. 13a) is reported at 516 F.2d 544. The opinion of the district court (Pet. 7a) is unreported. The opinion of the Kentucky Commission on Human Rights (Pet. 1a) is unreported.[1]

JURISDICTION

The judgment of the court of appeals was entered May 23, 1975 (Pet. 59a). A timely petition for rehear-

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[1] "Pet." refers to Parker Seal's petition for certiorari. "R." refers to the single appendix filed herewith.

ing was denied by order entered July 18, 1975 (Pet. 61a). A timely petition for a writ of certiorari was filed September 25, 1975. The Court granted the writ of certiorari on March 1, 1976 (R. 246). The jurisdiction of this Court rests upon 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND GUIDELINE INVOLVED

The Establishment Clause of the First Amendment provides: "Congress shall make no law respecting an establishment of religion . . . ."

Section 703(a)(1) of the Civil Rights Act of 1964, as amended, provides:

> "It shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's race, color, religion, sex, or national origin. . . ." 42 U.S.C. § 2000e-2(a)(1) (1974).

Section 701(j) of the Civil Rights Act of 1964, as amended, provides:

> "The term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business." 42 U.S.C. § 2000e(j) (1974).

Guideline 1605.1 of the United States Equal Employment Opportunity Commission provides:

> "(a) Several complaints filed with the Commission have raised the question whether it is discrimination on account of religion to discharge or refuse to hire employees who regularly observe Friday evening and Saturday, or some other day of the week, as the Sabbath or who observe certain special religious holidays during the year and, as a consequence, do not work on such days.
>
> "(b) The Commission believes that the duty not to discriminate on religious grounds required by Section 703(a)(1) of the Civil Rights Act of 1964, includes an obligation on the part of the employer to make reasonable accommodations to the religious needs of employees and prospective employees where such accommodations can be made without undue hardship on the conduct of the employer's business. Such undue hardship, for example, may exist where the employee's needed work cannot be performed by another employee of substantially similar qualifications during the period of absence of the Sabbath observer.
>
> "(c) Because of the particularly sensitive nature of discharging or refusing to hire an employee or applicant on account of his religious beliefs, the employer has the burden of proving that an undue hardship renders the required accommodations to the religious needs of the employee unreasonable.
>
> "(d) The Commission will review each case on an individual basis in an effort to seek an equitable application of these guidelines to the variety of situations which arise due to the varied religious practices of the American people." 29 C.F.R. § 1605.1 (1975).

QUESTIONS PRESENTED

Title VII of the 1964 Civil Rights Act, as amended, and the EEOC's "religious accommodation" guide-

line promulgated thereunder, require an employer to justify the discharge of an employee who refuses to perform regularly scheduled work for religious reasons, by showing that reasonable accommodation to the employee's religious requirements would impose undue hardship on the conduct of its business. The questions presented in the case are:

1. Whether the foregoing statute and guideline, which require an employer to accord preferential treatment to selected employees solely on the basis of their religious beliefs, violate the Establishment Clause of the First Amendment.

2. Whether the court of appeals erred in determining that an employer which has tried, unsuccessfully, to accommodate an employee who refuses to work regularly scheduled Saturdays is barred from showing that its continued efforts impose undue hardship.

STATEMENT OF THE CASE

Introductory Statement

This case presents two questions: whether the "religious accommodation" section of the Civil Rights Act of 1964, as amended, and a companion EEOC "guideline" can pass muster under the Establishment Clause of the First Amendment, and if they can, whether they have been correctly construed by the court of appeals below.[2]

[2] In light of the limited relief sought by Parker Seal in connection with the third question presented in the petition for certiorari, relating to conflicting panel decisions in the Sixth Circuit (Pet. 3, 22-24), that question may be deemed mooted by this Court's grant of plenary review.

After a year-long effort at accommodation, the petitioner, Parker Seal Company, discharged Paul Cummins, a plant supervisor who refused to work on Saturdays despite the company's demonstrated need for his services on that day.[3] Following a full evidentiary hearing, the Kentucky Commission on Human Rights ruled that Parker Seal could not accommodate Cummins' religious needs without placing an undue hardship on the conduct of its business. The United States District Court for the Eastern District of Kentucky reached the same conclusion, and added that Parker Seal had made a reasonable effort to accommodate Cummins' religious beliefs. But the Court of Appeals for the Sixth Circuit reversed because, in its view, Parker Seal had failed to demonstrate that Cummins' continued employment would engender "chaotic personnel problems," or that such employment would have some other "dire effect" upon Parker Seal's business. Judge Celebrezze dissented on the ground that the applicable federal statute and guideline violate the Establishment Clause of the First Amendment.

Parker Seal's Operation and Cummins' Supervisory Role

Parker Seal owns and operates an "o-ring" factory in Berea, Kentucky, where the company manufactures various rubber products from synthetic rubber compounds (R. 57; *see* R. 35). Throughout the early 1970's, the Berea plant has employed about 600 workers on two and sometimes three shifts (R. 57, 132, 231). Goods are produced in response to bookings (R.

[3] Parker Seal Company is the Kentucky trade name of Parker Corporation, formerly Parker-Hannifin Corporation.

100), and must be delivered shortly after receipt of orders (R. 220). The normal work week is five days, with Saturday work scheduled where necessary to keep up with orders; six-day weeks are frequently required (R. 135).

Cummins was hired by Parker Seal in 1958 (R. 53). In 1965 he became supervisor of the first shift of eight to 10 men in the "Banbury" (or rubber mixing) department of the Berea plant (R. 55, 56). As a supervisor, Cummins was salaried, and "not restricted to punching the time clock" (R. 78); so far as the union collective bargaining agreement was concerned, he was "part of management" (R. 79). Cummins was "responsible for the [Banbury] Department, an investment of thousands of dollars, and a group of people" (R. 205).

Cummins' supervisory position required him to be present whenever the first shift was operating, including Saturdays (R. 231). For five years Cummins voiced no objection to working on that day (R. 84).

Parker Seal's Efforts To Accommodate Cummins' Religious Demands

In July 1970, Cummins became a member of the World Wide Church of God, which forbids work from sundown on Friday to sundown on Saturday (R. 37). Previously, when he had first become interested in the Church, Cummins had taken off just the time needed to attend Saturday church services with his family; these usually lasted about two hours (R. 40, 104). However, upon assuming full membership, Cummins refused to work on Saturdays at all (R. 104).

Parker Seal took no immediate action against Cummins. To the contrary, the Berea plant manager assured Cummins that he "still had a job and . . . could observe [his] . . . Sabbath" (R. 66). For 14 months the company accommodated Cummins' religious views by requiring supervisors from the adjacent Stock Prep department to cover the Banbury department on the first Saturday shift (R. 63). Generally this involved one supervisor's covering both departments at the same time, although the plant manager regarded this as "absolutely not" good operating procedure and an arrangement that could not continue indefinitely (R. 124-25, 129). On those Saturdays when Stock Prep did not work, a substitute from among the other supervisors in the Berea plant was required to come in to work exclusively to cover the Banbury (R. 150). For that added work, the substitute supervisor received no extra pay (R. 156).

Meanwhile, Cummins drew a set salary whether or not he worked Saturdays (R. 188). Indeed, by virtue of his seniority, he continued to receive more pay than many of his fellow supervisors (R. 197). He never offered to take less pay for not being available to work on Saturdays (R. 101).

Parker Seal's Declining Profitability and Operating Difficulties

The profitability of the division which included Parker Seal's Berea operation had started to decline in 1968 and reached a low ebb in early 1970 (R. 207). In October of that year the company laid off a large number of both hourly and salaried employees at Berea (R. 208). The Berea plant had "a deteriorating morale factor," and the "output per person had dropped significantly in that period of time" (R. 209).

In November 1970, the plant manager was transferred and a new manager was brought in (R. 209-10). At once he recognized that "there were economic problems and supervisory [problems] and we had to get them straightened out or we were on our way to . . . folding it up" (R. 173). The new plant manager was instructed "to solicit and, in effect, to insist on longer hours, more personal interest, more involvement on the part of the Supervision" (R. 210).

In particular, the new manager was concerned about the Banbury department, where he had heard there were problems even before he arrived (R. 131, 175). The Berea Banbury exhibited "a tremendous lack of consistency from day to day and from shift to shift regarding the efficiency and the output," particularly on the unsupervised second shift (R. 218-19). Significantly, the output of the Banbury was little better than half that of the "almost identical" Parker Seal plant in Winchester, Kentucky (R. 218). Nonetheless, when the new manager learned of Cummins' Saturday absenteeism, he assured Cummins: "[A]s long as it don't cause any problems I have no objections to you observing the Sabbath" (R. 69). Ultimately, however, the new manager concluded that Cummins' presence in the Banbury department was required on Saturdays. As he testified:

> "[Cummins'] religion . . . didn't bother me at that time, one way or the other. The fact that he could not work Saturday did. We run a plant that operates six (6) days a week a good percentage of the time. Paul, in a responsible position, running a department, had to be there if that department was to function the way it should" (R. 180).

Cummins disagreed. He adhered to the view that his job was more one of scheduling than of supervision. In his opinion, he could handle all necessary scheduling on Friday, in advance of Saturday work (R. 99).[4]

During the summer of 1971, as the result of substantial overtime work, the other supervisors were working as much as 72 hours a week with no increase in pay (R. 140, 176-77). Cummins continued at his usual 40-hours-a-week pace (R. 177). The other supervisors began to complain (R. 144, 177). As one of them put it, "I respected Paul's religion but . . . if he was scheduled to work, he should work on Saturday" (R. 145). The plant manager could not overlook the smoldering resentment among Cummins' fellow supervisors:

> "[W]hen it came down to [Cummins'] . . . interaction with this other group of three (3) Supervisors, the four (4) of them represented almost one quarter (¼) of our Supervisory force, his effect on them and the way they were feeling. I had direct complaints from two (2) of them,

[4] Ostensibly for the same reason, Cummins declined to come in with his shift two hours early in the morning in response to scheduled morning overtime; he judged his presence unnecessary until later in the morning, when he could begin his scheduling work (R. 177). By contrast, all other supervisors at the Berea plant adhered to company policy that they must work the same hours as the men for whom they were responsible, even when circumstances required those hours to be extended to irregular times (R. 121, 158, 166-67, 169). Although the new plant manager put out a memo to remind the supervisors that they "were required to come in with [their] . . . men . . . whenever they were on the job" (R. 158), Cummins refused to do so (R. 177). The plant manager felt he "could live with that," although it gave rise to a doubt in his mind (R. 204).

> that forced, actually forced me into a decision. I had to do something to get one quarter (¼) of my Supervisory force straightened out" (R. 204).

Consistently with his assigned directive to stimulate plant morale, the new plant manager did "not believe in giving orders to Supervisors, I suggest to them and expect them to work it out themselves" (R. 178). Thus, he told Cummins that "if he was to be able to work with these three (3) fellows down in Stock Prep, he was going to have to go down and volunteer to take on a four (4) hour period for them in the evening" (R. 185). Despite this advice, Cummins volunteered to relieve a fellow supervisor only about half a dozen times over a 14-month period—once as a "forced volunteer," when a fellow worker "got after" him to relieve an ailing colleague (R. 142, 155, 183-84; *see* R. 141).

In the summer of 1971, the plant manager told Cummins he needed a man to work six days a week, and urged him to reconsider his position on Saturday work (R. 71, 175). Cummins refused. On September 3, 1971, he was discharged (R. 72).[5] He was terminated because the Parker Seal management, having attempted for 14 months to defer to his religious practices, determined that it could no longer accommodate his continued unavailability for work on Saturdays. As the plant manager put it in his contemporaneous notification, Cummins was let go because he was "unable to work all days scheduled for work" (R. 181).

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[5] Transfer to a lower grade was barred by Parker Seal's collective bargaining agreement with the union (*see* R. 72, 99).

Legal Proceedings Below

Upon his discharge, Cummins filed grievances against Parker Seal with both the Kentucky Commission on Human Rights (the "KCHR") (R. 26) and the United States Equal Employment Opportunity Commission (the "EEOC") (R. 6). Before the KCHR, Cummins' counsel explicitly disclaimed any contention that Parker Seal had "intended to discriminate against Mr. Cummins or anyone else of his religion by having this Saturday working policy" (R. 30).

After a full evidentiary hearing, the KCHR dismissed Cummins' complaint. The Kentucky Commission found that during the period in which Parker Seal permitted Cummins to take Saturdays off, "all [other] supervisory personnel . . . were required to work all hours and days of scheduled regular and scheduled overtime work in their respective departments on their respective shifts"; also, that "Cummins refused to report for scheduled hours and days of regular and overtime work on his shift in his department but lost no wages or benefits as the result of his refusal to work for religious reasons" (Pet. 3a-4a). The Commission applied Kentucky law, which in its view embodied essentially verbatim the original Civil Rights Act of 1964 together with the EEOC's Guideline 1605.1, as revised in 1967. It concluded that Parker Seal could not "accommodate [Cummins'] . . . religious needs without placing an undue hardship on the conduct of [its] business" (Pet. 6a).

Following the EEOC's failure to take action on Cummins' complaint and the agency's issuance of a "right to sue" letter (R. 10), Cummins brought the

present action against Parker Seal in the United States District Court for the Eastern District of Kentucky (R. 1). The parties stipulated to the record before the KCHR (R. 242). On that record, the district court agreed with the KCHR that Parker had

> "... made a reasonable accommodation to the plaintiff's religious needs and that no further accommodation could be made at the time of the [plaintiff's] ... dismissal from employment without creating an undue hardship on the employer's business.
>
> "The defendant was therefore justified in discharging the plaintiff" (Pet. 8a-9a).

On appeal, the Court of Appeals for the Sixth Circuit reversed, one judge dissenting. 516 F.2d 544 (Pet. 13a). For himself and Judge McCree, Chief Judge Phillips concluded that under both the applicable EEOC guideline and the Civil Rights Act of 1964, as amended, Parker had failed to demonstrate "chaotic personnel problems," or any other "dire effect upon the operation of its business." 516 F.2d, at 550 (Pet. 29a). The court suggested that Parker Seal "could have required Appellant to work ... on Sundays," *ibid.*—even though Cummins was already present on the few Sundays on which the Banbury functioned (R. 63, 135, 198). Alternatively, the court said, Parker "could have reduced Appellant's salary commensurately with his shorter work week," *Ibid.*—thereby cutting his pay almost in half. Finally, the court taxed Parker for its one-year effort at accommodation, professing inability to understand "why an accommodation that was reasonable for over a year ... suddenly became unreasonable in September 1971." 516 F.2d, at 547 (Pet. 20a).

The court of appeals also rejected Parker Seal's constitutional claim that the applicable provisions of the Civil Rights Act and EEOC guideline violate the Establishment Clause of the First Amendment. The court conceded that "some religious institutions will derive incidental benefits" from the guideline and statute. 516 F.2d, at 553 (Pet. 36a). But it discounted the expressed view of the sponsor of the 1972 statutory amendment that the legislation was designed to counteract the "dwindling of the membership of some ... religious organizations" (remarks of Sen. Randolph); that argument by one Senator, in the court's view, did "not require the conclusion that Congress enacted the legislation to promote and support *a particular religion.*" *Ibid.* (emphasis supplied). Rather, the court concluded, the statute and regulation could be salvaged because they "are applicable to *all* members of *all* religious faiths who observe Saturday as the Sabbath." 516 F.2d, at 553 (Pet. 37a) (emphasis in original). The court professed to see no violation of the Establishment Clause in this acknowledged federal legislative aid to Sabbatarian religious activity.

Judge Celebrezze dissented. In his view, the statute and guideline had both the purpose and primary effect of promoting and advancing particular religious sects, and therefore violated the Establishment Clause. 516 F.2d, at 554-60 (Pet. 41a-57a).

ARGUMENT

SUMMARY

As construed and enforced by the court below, the "religious accommodation" provisions of Title VII

compel the private employer to alter his practices, and even to suffer detriments to his business, at the insistence of any employee who asserts that his religious practices conflict with job-related work schedules. By invoking governmental power to force one citizen to yield in this fashion to the religious dictates of another, the "accommodation" provisions violate the Establishment Clause of the First Amendment. Whether judged by the purpose for which the "religious accommodation" provisions were added to Title VII, by their primary effect, or by the ongoing entanglement of religious and secular issues and institutions necessitated by administration of the "accommodation" requirement, the provisions at issue cannot survive constitutional scrutiny.

On the facts of this case, the court below has erred in any event in imposing an unrealistic burden on the employer—*first,* by relying incorrectly upon the employer's good faith efforts to attempt accommodation as evidence of the invalidity of his ultimate determination that accommodation was no longer possible; and *second,* by failing to attribute proper significance to the evidence in the record which supports the determination—as made by Parker Seal in the first place, and subsequently by the State human rights commission and the district court—that continued accommodation of Cummins' religious practices would impose an undue hardship upon Parker Seal's business operations. The obligation thus fashioned by the court of appeals differs altogether from the fundamental duty to avoid discrimination in employment mandated by Title VII, as originally enacted and as implemented by this Court in *Griggs* v. *Duke Power Co.,* 401 U.S. 424 (1971).

I. The 1972 "Religious Accommodation" Amendment and EEOC's 1967 Guideline Violate the Establishment Clause

The "religious accommodation" provisions cannot withstand constitutional scrutiny—particularly not as construed and enforced by the court of appeals below. The provisions violate the cardinal principle of governmental neutrality towards religion in their necessary effect, in the purpose for which the 1972 statutory amendment was offered, and in the entangling influence of the statutory scheme. That scheme requires private employers to accord preferential treatment to selected employees, even at the sacrifice of legitimate business interests, solely on account of those employees' religious beliefs. Moreover, the provisions cannot be justified as necessary to protect the free exercise interests of employees—those interests are already served by the original proscription in Title VII of religious discrimination in private employment.

A. The "Religious Accommodation" Provisions Impose Special Burdens Upon Private Employers on Exclusively Religious Grounds

Section 703(a)(1) of the Civil Rights Act of 1964, as enacted and as it has stood at all pertinent times, provides in relevant part:

> "It shall be an unlawful employment practice for an employer . . . to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . religion. . . ." 42 U.S.C. § 2000e-2(a)(1) (1974).

In 1967 the EEOC promulgated guidelines, purportedly to implement the statutory mandate against religious discrimination. 29 C.F.R. § 1605.1.[6] The guidelines fashioned an unprecedented obligation on the part of the employer to defer to his employees' professed religious beliefs. The Commission stated:

> ". . . the duty not to discriminate on religious grounds, required by section 703(a)(1) of the Civil Rights Act of 1964, includes an obligation on the part of the employer to make reasonable accommodations to the religious needs of employees and prospective employees where such accommodations can be made without undue hardship on the conduct of the employer's business." § 1605.1(b).

Further, the Commission placed upon the employer the burden of substantiating his case under the "religious accommodation" provisions. § 1605.1.(c).[7]

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[6] The 1967 guidelines provide in pertinent part:

". . . [S]ection 703(a)(1) of the Civil Rights Act of 1964 . . . includes an obligation on the part of the employer to make reasonable accommodations to the religious needs of employees and prospective employees where such accommodations can be made without undue hardship on the conduct of the employer's business.

". . . [T]he employer has the burden of proving that an undue hardship renders the required accommodations to the religious needs of the employee unreasonable." 29 C.F.R. § 1605.1 (1975).

[7] The 1967 guidelines replaced an earlier version, promulgated in 1966, which had imposed a less onerous burden on the employer to accommodate the religious practices of his employees. 31 Fed. Reg. 8370. The 1966 guidelines had required no accommodation whatever if such efforts would have resulted in either a serious inconvenience to the employer or a disproportionate allocation of unfavorable work. Further, the guidelines authorized the employer to prescribe a work week applicable to all his employees, even if his schedule did not operate uniformly in its impact upon their religious practices. Specifically, the guidelines provided:

> "The employer may prescribe the normal work week and forseeable overtime requirements, and, absent an intent on the part of the employer to discriminate on religious grounds, a job applicant or employee who accepted the job knowing or having reason to believe that such requirements would conflict with his religious obligations is not entitled to demand any alteration in such requirements to accommodate his religious needs."

Some courts questioned whether the EEOC's 1967 revised guidelines were authorized by Title VII's original prohibition of religious discrimination. *Dewey v. Reynolds Metals Co.*, 429 F.2d 324, 331, n.1, 334 (6th Cir. 1970), *aff'd by equally divided Court*, 402 U.S. 689 (1971); *Kettell* v. *Johnson & Johnson*, 337 F. Supp. 892, 895 (E.D. Ark. 1972).[8] Those questions led Congress in 1972 to amend the original statute to add the following definition of the term "religion" as Section 701(j) of the Act:

> "The term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business." 42 U.S.C. 2000e(j) (1974).[9]

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[8] The questioning has recently been renewed in the Sixth Circuit. *Reid* v. *Memphis Pub. Co.*, 521 F.2d 512, 519 (6th Cir. 1975), *cert. pending*, No. 75-1105.

[9] The parties do not dispute the applicability of either Guideline 1605.1 or the 1972 statutory amendment, even though the discharge complained of occurred in 1971 (*see* Pet. 12, n.6). At all relevant times, Parker Seal's Berea operations were governed by Kentucky law which, as construed by the state human rights commission,

That statutory definition thus incorporated the "religious accommodation" theory of the EEOC's revised 1967 guideline. *Draper* v. *United States Pipe & Foundry Co.*, 527 F.2d 515, 517, n.1 (6th Cir. 1975); *Cummins* v. *Parker Seal Co.*, 516 F.2d, at 547 (Pet. 19a).[10]

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imposed an "obligation to reasonably accommodate the religious beliefs" of its employees (Pet. 6a). The state law paralleled the EEOC's 1967 guidelines, which had been adopted more than four years before Cummins' discharge. Moreover, the 1972 amendment was in effect when Cummins filed his civil action in the district court. In these circumstances, application of the "accommodation" provision of the 1972 amendment to this case was unobjectionable. *See Bradley* v. *School Board*, 416 U.S. 696, 711 (1974).

[10] The obligations imposed upon Parker Seal and other private employers by the "religious accommodation" provisions go far beyond those before this Court in *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971). There, in the context of asserted racial discrimination, the Court declared:

> "Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed. What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification." 401 U.S., at 431.

And again:

> "Far from disparaging job qualifications as such, Congress has made such qualifications the controlling factor, so that race, *religion*, nationality, and sex *become irrelevant*. What Congress has commanded is that any tests used must measure the person for the job and not the person in the abstract." *Id.*, at 436 (emphasis supplied).

The 1972 amendment and EEOC guideline run counter to those objectives. *First*, the "accommodation" provisions require a "discriminatory preference," based upon considerations of religion. Far from rendering religious views irrelevant, they dictate that the private employer must alter his business practices, or depart from them altogether, in deference to the professed religious beliefs of his employees. [Footnote continued on next page.]

B. The 1972 Amendment and 1967 Guideline Cannot Survive This Court's Tripartite Establishment Clause Test

The Court's "three-part test," evolved in recent Establishment Clause cases, requires no extended exposition.

> "First, the statute must have a secular legislative purpose. . . . Second, it must have a 'primary effect' that neither advances nor inhibits religion. . . . Third, the statute and its administration must avoid excessive government entanglement with religion." *Meek* v. *Pittenger*, 421 U.S. 349, 358

Second, unlike the situation presented in other aspects of Title VII enforcement, it does not suffice for the employer challenged under the "religious accommodation" provisions to show that his work rules are reasonably related to the jobs which his employees are to perform. *Cf. Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 436 (1975); *Griggs* v. *Duke Power Co.*, 401 U.S., at 432. Once an employee claims infringement of his religious liberty, the employer must "accommodate" himself to the demands engendered by that liberty; further, he must assume a "hardship" in reaching that accommodation—even a substantial one, unless a federal court ultimately decides that the "hardship" is "undue."

Third, unlike the situations presented in *Griggs* and *Albemarle Paper*, the efficient operation of the employer's business will not be enhanced by compliance with the "accommodation" provisions. Imposition of the obligation to "accommodate" does not eliminate an irrational vestige of past discrimination—for there need not have been any. Nor does it induce the employer to run his business without regard to irrelevant racial, sexual or other personal characteristics of his employees. To the contrary, the employer confronted with a demand for religious preference is forced by the statutory scheme to introduce discriminatory practices into his operations, and to defer to a religious criterion which is surely irrelevant to productivity, which may be counterproductive to his business, and which may adversely and unfairly affect the interests of other, nonreligiously motivated employees. *Cf. Franks* v. *Bowman Transp. Corp.*, —— U.S. ——, ——, 44 U.S.L.W. 4356, 4368 (Mar. 24, 1976) (opinion of Powell, J.).

(1975) (plurality opinion of Stewart, J.) (citations omitted). *Accord, Committee for Public Educ.* v. *Nyquist,* 413 U.S. 756, 772-73 (1973); *Tilton* v. *Richardson,* 403 U.S. 672, 678 (1971) (plurality opinion of Burger, C.J.); *Lemon* v. *Kurtzman,* 403 U.S. 602, 612-13 (1971); *Walz* v. *Tax Commission,* 397 U.S. 664, 674 (1970).[11]

A statute challenged on Establishment Clause grounds must satisfy each branch of the Court's three-part test. Thus, "[i]f either [the purpose or primary effect of the enactment] is the advancement . . . of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution." *Epperson* v. *Arkansas,* 393 U.S. 97, 107 (1968); *Abington School Dist.* v. *Schempp,* 374 U.S. 203, 222 (1963). *Accord, Committee for Public Educ.* v. *Nyquist,* 413 U.S., at 774. Similarly, the excessive "entanglement" of governmental with sectarian activity is alone sufficient to warrant invalidation of legislation. *Lemon* v. *Kurtzman,* 403 U.S., at 613-15.

Here, we submit, the challenged statutory scheme cannot pass muster under any of the three established criteria.

1. *The Purpose Underlying the 1972 Amendment Is Purely Sectarian*

a. *The Legislative History Reveals an Exclusively Non-Secular Motive*

In the past this Court has consistently taken at face value the legislature's statement of its purpose in adopting legislation challenged on Establishment

[11] *See also infra,* at 37 n.19 (discussing the separate views of Mr. Justice Brennan).

Clause grounds. *Meek* v. *Pittenger,* 421 U.S., at 363 (plurality opinion); *Sloan* v. *Lemon,* 413 U.S. 825, 829-30 (1973); *Committee for Public Educ.* v. *Nyquist,* 413 U.S., at 773; *Hunt* v. *McNair,* 413 U.S. 734, 741-42 (1973); *Tilton* v. *Richardson,* 403 U.S., at 678-79 (plurality opinion); *Lemon* v. *Kurtzman,* 403 U.S., at 613. The same rule should apply here.

The evidence of legislative intent underlying the 1972 "religious accommodation" amendment points to an exclusively non-secular, sectarian purpose. The provision arose as a floor amendment sponsored by Senator Randolph. 118 Cong. Rec. 705 (1972). The Senator's sponsoring remarks reveal that advancement of religion—specifically, those religions which observe the Sabbath other than on Sunday—was the sole purpose for which the amendment was offered.

> "I am sure that my colleagues are well aware that there are several religious bodies—we could call them *religious sects;* denominational in nature—not large in membership, but with certain strong convictions, *that believe there should be a steadfast observance of the Sabbath and require that the observance of the day of worship, the day of the Sabbath, be other than on Sunday.* On this day of worship work is prohibited whether the day would fall on Friday, or Saturday or Sunday. There are approximately 750,000 men and women who are Orthodox Jews in the U.S. work force who fall in this category of persons I am discussing. There are an additional 425,000 men and women in the work force who are Seventh Day Adventists.
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> * * *
>
> "I say to the distinguished chairman of the Labor and Public Welfare Committee, who manages this bill, that there has been a partial refusal

at times on the part of employers to hire or continue in employment *employees whose religious practices rigidly require them to abstain from work in the nature of hire on particular days.* So there has been, because of understandable pressures, such as commitments of a family nature and otherwise, *a dwindling of the membership of some of the religious organizations* because of the situation to which I have just directed attention.

* * *

"*My own pastor* in this area, Rev. Delmar Van Horne, has expressed his concern and distress that *there are certain faiths that are having a very difficult time,* especially with the younger people and understandably so, with reference to a possible inability of employers on some occasions to adjust to work schedules to fit the requirements of the faith of some of their workers." 118 Cong. Rec. 705 (emphasis supplied).

Time and again, Senator Randolph stressed his objective—to benefit Saturday Sabbatarians, of which he himself was one.[12]

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[12] "Mr. President, I am a member of a denomination which is a relatively small one, the Seventh-Day Baptists. Perhaps there are only 5,000 individuals within that denomination in the work force. I do think it is important for me to say that within the groups that I have mentioned, we think in terms of our observance of the Sabbath beginning at sundown Friday evening and ending at sundown Saturday evening, following the Biblical words, 'From eve unto eve shall you celebrate your Sabbath.' I make this statement only by way of explanation of the groups I have just mentioned.

* * *

"I hold my membership in our church here in this area. We have the Washington Seventh Day Baptist Church. We have several of those churches in my State of West Virginia. At an earlier period I held my membership in the Salem, W.Va., Seventh Day Baptist Church. [Footnote continued on next page.]

Thereafter, without further debate, Senator Randolph's proposed amendment passed the Senate by a vote of 55-0. 118 Cong. Rec. 731. The provision was retained after conference, with only a passing reference made in the Conference Committee report. H.R. Rep. No. 92-899, 92d Cong., 2d Sess. 15 (1972); S. Rep. No. 92-681, 92d Cong., 2d Sess. 15 (1972). Likewise, the provision received only a cursory reference on the House floor prior to passage by that body. 118 Cong. Rec. 7569 (1972).

The foregoing history is devoid of indication that Congress intended other than to advance religious interests. Rather, the history reveals an "abandon[ment of] secular purposes in order to put an imprimatur on one religion, or on religion as such, or to favor the adherents of any sect or religious organization." *Gillette* v. *United States,* 401 U.S. 437, 450 (1971); *see Engel* v. *Vitale,* 370 U.S. 421, 430-31 (1962); *Torcaso* v. *Watkins,* 367 U.S., 488, 495 (1961).

"I invite the attention of my able colleague to the fact that in the State of New Jersey there are many, many Seventh Day Baptist churches. In places like Shiloh, Marlboro, and Plainfield—actually being the headquarters of the denomination to which I belong, located close to New York City, but actually located in the State of New Jersey.

* * *

"I refer to the presence in the Chambers of our colleague from Ohio (Mr. Saxbe). There are, in the Seventh Day Baptist Church, of which I am a member, many individual members of our faith who belong to our churches within the State of Ohio. We have, usually, small churches in small communities in the state the Senator so ably represents.

"I add also the Senator from Colorado. I think it is not inappropriate for me to say that one of our strong churches is in Denver. Another of our strong churches is in Boulder, in the State of Colorado. . . ." 118 Cong. Rec. 705-06.

b. *A Secular Purpose Cannot Be Found in Supposed Efforts to Avert Religious Discrimination*

In the face of the foregoing legislative history of the 1972 amendment, the court below purported to detect the requisite secular purpose in a supposed Congressional wish "to put teeth in the existing prohibition of religious discrimination." 516 F.2d, at 552 (Pet. 33a).[13] But there is no factual basis for that theory.

First, at all times the language of the 1964 statute has prohibited religious discrimination in hiring or advancement.[14] Even without the 1972 amendment, the federal courts surely could implement the original provision by striking down sophisticated as well as simple-minded modes of religious discrimination.[15] As

[13] *Cf. Hardison* v. *Trans World Airlines, Inc.*, 375 F. Supp. 877, 888 (W.D. Mo. 1974), *rev'd on other grounds*, 527 F.2d 33 (8th Cir. 1975), *cert. pending*, No. 75-1126, 75-1385.

[14] Section 703(a)(1) of the Civil Rights Act of 1964, as amended, provides in pertinent part:

> "It shall be an unlawful employment practice for an employer . . . to . . . discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . religion. . . ." 42 U.S.C. § 2000e-2(a)(1) (1974).

[15] For example, in *Jackson* v. *Veri Fresh Poultry, Inc.*, 304 F. Supp. 1276 (E.D. La. 1969), the unrefuted testimony of the plaintiff showed that she was fired by her foreman for not working after sundown on Fridays on the supposed authority of the plant superintendent—who had previously told her he did not think her taking off early would be a problem. Similarly, in *Claybaugh* v. *Pac. Northwest Bell Tel. Co.*, 355 F. Supp. 1, 5 & n.8 (D. Ore. 1973), the employer regularly permitted union deviations from employees' work schedules sought on other than religious grounds—deviations which could have been, but were not, extended to the plaintiff. [Footnote continued on next page.]

Judge Celebrezze noted below,

> "Striking down the religious accommodation rule would not change the law requiring employers to disregard religion in employment decisions. Discrimination based on religion is illegal. If a Saturday Sabbath observer can show that an employer discharged him for refusing to work on Saturdays although similarly situated employees were not required to work on Saturdays or were exempted from Sunday work, he could maintain that the actual reason for his discharge was religious discrimination, not his refusal to work on Saturdays." 516 F.2d, at 559-60 (Pet. 55a).

Second, the legislative history of the 1972 amendment contains no suggestion that the existing prohibition of religious discrimination in Title VII was deemed inadequate. For that matter, there was sparse evidence of religious discrimination before Congress

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Again, in *Shaffield* v. *Northrop Worldwide Aircraft Services, Inc.*, 373 F. Supp. 937, 944 (M.D. Ala. 1974), positions suitable to accommodate the aggrieved plaintiff, where "his religious practices would be no burden to the defendant or its work," were filled instead by employees newly hired or recalled. Finally, in *Weitkenaut* v. *Goodyear Tire & Rubber Co.*, 381 F. Supp. 1284 (D. Vt. 1974), the employer refused to excuse the plaintiff one Friday night a month—even when the employee was willing to take a job transfer and to arrange for willing and available substitutes, and the employer had previously adjusted the work schedules of others for both religious and non-religious reasons. Episodes such as these could properly be treated as indicia of religious discrimination, forbidden by the original Title VII without regard to the "accommodation" structure. In sum, there is no reason to suppose that where circumstances require, the federal courts cannot identify a "case where [the] . . . discharge [is] . . . pretextual, masking a latent bias against [the employee's] . . . faith or against him for adhering to it." *Draper* v. *United States Pipe & Foundry Co.*, 527 F.2d 515, 524 (6th Cir. 1975) (Engel, J., dissenting).

when it originally enacted Title VII in 1964. According to Congressman Celler, Chairman of the House Judiciary Committee:

> "We did not have very much testimony of discriminations on the grounds of religion. You will notice in one of the titles, religion is left out. . . .
>
> We had very little evidence—I do not think we had any of it insofar as the Committee on the Judiciary is concerned that any particular sect or religion had been discriminated against." 110 Cong. Rec. 1528 (1964).

Third, the "religious accommodation" provisions undermine rather than enhance the objective of defeating discrimination in employment—indeed, they compel discrimination. As Judge Celebrezze put it:

> "Section 2000e(j) defines religion so as to require that persons receive preferential treatment because of their religion. This contradicts the secular purpose behind the original Title VII. Rather than 'putting teeth' into the Act, it mandates religious discrimination, thus departing from the Act's basic purpose." 516 F.2d, at 556. (Pet. 45a-46a).

c. *The Amendment and Guideline Do Not Reflect an Accommodation of Secular Interests*

The majority below also sought refuge in the proposition that the "religious accommodation" provisions merely

> ". . . reflect a legislative judgment that, as a practical matter, certain persons will not compromise their religious convictions and that they should not be punished for the supremacy of conscience." 516 F.2d, at 552-53 (Pet. 35a).

This argument is fallacious for two reasons. *First,* the interest of persons like Cummins in enhancing their religious activity at the expense of their work-related obligations cannot be described as "secular" —*ex hypothesis,* it is "sectarian." *Second,* as Judge Celebrezze pointed out, 516 F.2d, at 556 (Pet. 46a), the employer's maintenance of job-related assignments cannot be characterized as "punishment." By itself, the lack of any punitive purpose or effect disposes of the court of appeals' reliance upon *Gillette* v. *United States, supra,* which was a criminal prosecution for refusal to submit to induction. *See* 516 F. 2d, at 552 (Pet. 34a).

The court of appeals also professed to find support for its discovery of an overriding secular objective in the "Sunday closing" decisions of this Court.[16] That too was erroneous. Those decisions all rest on the conclusion that although Sunday-closing statutes had religious origins, their present overriding purpose and effect are largely secular—to set aside "one uniform day of rest for all workers." *Sherbert* v. *Verner,* 374 U.S. 398, 408 (1963).

The "Sunday closing" cases rest additionally on accepted tradition. A like consideration led this Court to sustain the long-standing practice of exempting religious entities from state property taxes. *Walz* v. *Tax Commission,* 397 U.S., at 672-73. No such historical tradition of governmentally compelled obeisance by

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[16] *McGowan* v. *Maryland,* 366 U.S. 420 (1961); *Two Guys from Harrison-Allentown, Inc.* v. *McGinley,* 366 U.S. 582 (1961); *Braunfeld* v. *Brown,* 366 U.S. 599 (1961); *Gallagher* v. *Crown Kosher Super Market,* 366 U.S. 617 (1961).

one man to another's religion supports the 1967 guideline or 1972 amendment.

Finally, the "Sunday closing" cases confirm the correctness of Parker Seal's position. For, in the view of at least one member of this Court, those cases hold that the States may compel the Saturday Sabbatarian "to choose between his religious faith and his economic survival . . . in the interest of enforced Sunday togetherness. . . ." *Braunfeld* v. *Brown,* 366 U.S. 599, 616 (1961) (Stewart, J., dissenting). Surely Parker Seal—which is under no constitutional obligation to further the free exercise of its employees' religious beliefs (*see infra*, at 38-39) —can require a departmental supervisor to report to work whenever his men are scheduled to do so."

2. *The Primary Effect of the 1972 Amendment and the 1967 Guideline Is to Advance Religion*

On this branch of the Court's three-part Establishment Clause test, the crucial question is whether the

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[17] The court of appeals also stressed the absence of "financial support . . . for religious institutions." 516 F.2d, at 553 (Pet. 36a). The point was hardly dispositive. For the Establishment Clause does more than forbid a formal "state religion," *Committee for Public Educ.* v. *Nyquist,* 413 U.S., at 771; *Lemon* v. *Kurtzman,* 403 U.S., at 612. It does not "simply bar a congressional enactment establishing a church." *Abington School Dist.* v. *Schempp,* 374 U.S., at 220; *McGowan* v. *Maryland,* 366 U.S., at 441. The Clause reaches beyond state subsidies and tax benefits for religious groups to proscribe the Government's nonfinancial "sponsorship" of religious organizations as well. *Committee for Public Educ.* v. *Nyquist,* 413 U.S., at 772; *Walz* v. *Tax Commission,* 397 U.S., at 668; *Lemon* v. *Kurtzman,* 403 U.S., at 612. In sum, the Clause "forbids subtle departures from neutrality, . . . as well as obvious abuses." *Gillette* v. *United States,* 401 U.S., at 452; *Walz* v. *Tax Commission,* 397 U.S., at 696 (opinion of Harlan. J.).

"principal or primary effect [of the legislative program] advances religion." *Tilton* v. *Richardson,* 403 U.S., at 679 (plurality opinion); *cf. Committee for Public Educ.* v. *Nyquist,* 413 U.S., at 783, n.39. Here, the *sole* effect of the 1972 amendment and the EEOC guideline is to advance religion. In violation of this Court's specific mandate, the provisions at issue both "aid all religions" and "prefer one religion over another." *Walz* v. *Tax Commission,* 397 U.S., at 670; *Everson* v. *Bd. of Educ.,* 330 U.S. 1, 15 (1947).

First, the "religious accommodation" provisions "aid all religion as against non-believers . . . ." *Walz* v. *Tax Commission,* 397 U.S., at 695 (opinion of Harlan, J.); *id.,* at 713 (Douglas, J., dissenting); *Torcaso* v. *Watkins,* 367 U.S. 488, 495 (1961). The assistance which these provisions extend to "predominantly church-related, nonpublic [activities] . . . inescapably results in the direct and substantial advancement of religious activity, . . . and thus constitutes an impermissible establishment of religion." *Meek* v. *Pittenger,* 421 U.S., at 366 (plurality opinion) (footnote omitted); *cf. Committee for Public Educ.* v. *Nyquist,* 413 U.S., at 781-83 & n.39; *Everson* v. *Bd. of Educ.,* 330 U.S., at 15.

The court below conceded that certain religious institutions would benefit from the "accommodation" provisions, in that "churches holding services on Saturdays may enjoy a somewhat larger attendance with a correspondingly fuller collection plate," 516 F.2d, at 553 (Pet. 36a)—precisely the purpose expressed by Senator Randolph in sponsoring the 1972 amendment. The court of appeals thereby recognized that the "religious accommodation" requirement "imposes a priority of the religious over the secular." Edwards

& Kaplan, "Religious Discrimination and the Role of Arbitration Under Title VII," 69 *Mich. L. Rev.* 599, 628 (1971). As Judge Celebrezze put it,

> "Only those with 'religious practices' may benefit from the rule. Others are forced to submit to uniform work rules and to bear the burdens imposed by their employers' accommodation to religious practitioners. Thus, the rule discriminates against those with no religion, although the freedom not to believe is within the First Amendment's protection." 516 F.2d, at 558 (Pet. 51a).

The discrimination feared by Judge Celebrezze is evident on the record in this case. For over a year, Cummins' fellow employees were required to take up the slack occasioned by his absence; at one point, Cummins was adhering to his customary 40-hour schedule at the same time that fellow supervisors continued to put in up to 70 hours a week—with no increase in pay, and at an annual salary in some instances lower than his (R. 140, 176-77, 197).

Second, the challenged provisions "effect . . . favoritism among sects . . . ." *Walz* v. *Tax Commission,* 397 U.S., at 695 (opinion of Harlan, J.); *Abington School Dist.* v. *Schempp,* 374 U.S., at 305 (opinion of Goldberg, J.). In practice, the "religious accommodation" provisions impose on employers the views of those who observe the Sabbath on Saturdays, or who otherwise believe that their religious views mandate deference by others. The majority below conceded as much when it urged that the law did not run afoul of the Establishment Clause because the statute applies to "all members of all religious faiths *who observe Saturday as the Sabbath.*" 516 F.2d, at 553 (Pet. 37a) (emphasis supplied). That contention proves that the

statutory scheme and guideline effectively discriminate among religions. As Judge Celebrezze noted below:

> "Only those [religious sects] which require their followers to manifest their belief in acts requiring modification of an employer's work rules benefit, while other employees are inconvenienced by the employer's accommodation. By singling out particular sects for government protection, the Federal Government has forfeited the pretense that the rule is merely part of the general ban on religious discrimination." 516 F.2d, at 558 (Pet. 51a-52a).

Thus, because they aid both religion generally and some religions over others, the "religious accommodation" provisions violate the guiding principle of neutrality—"perhaps the central purpose of the Establishment Clause . . . ." *Gillette* v. *United States,* 401 U.S., at 449. The provisions depart from the constitutionally mandated attitude on the part of Government that "shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma." *Meek* v. *Pittenger,* 421 U.S., at 395-96 (opinion of Rehnquist, J.); *Walz* v. *Tax Commission,* 397 U.S., at 669; *Zorach* v. *Clauson,* 343 U.S. 306, 313 (1952). *Accord, Lemon* v. *Kurtzman,* 403 U.S., at 656 (opinion of Brennan, J.); *Epperson* v. *Arkansas,* 393 U.S., at 103-04; *Bd. of Educ.* v. *Allen,* 392 U.S. 236, 249 (1968) (Harlan, J., concurring); *Everson* v. *Bd. of Educ.,* 330 U.S., at 18.

The "religious accommodation" provisions cannot be salvaged on the theory that they somehow extend favored treatment to a broad class of employees, of

whom some happen to be religiously motivated—on their face, the provisions do no such thing. The "accommodation" scheme thus contrasts tellingly with other statutes which have survived Establishment Clause scrutiny. Prominent among these is the state property tax exemption for charitable and non-profit entities sustained in *Walz* v. *Tax Commission, supra,* which extended not only to religious and social service organizations, but also to scientific, literary, bar, library, patriotic, and historical groups. *See* 397 U.S., at 689 (Brennan, J., concurring); *id.,* at 696-97 (opinion of Harlan, J.). To like effect, the Court has concluded, is State aid to *all* schoolchildren, including those attending sectarian schools—aid such as the provision of busing, *Everson* v. *Bd. of Educ., supra,* and textbooks, *Meek* v. *Pittenger,* 421 U.S., at 359-62 (plurality opinion), 388 (opinion of Rehnquist, J.); *Bd. of Educ.* v. *Allen, supra.*

On the other hand, the Court has consistently invalidated legislative schemes whose benefits have flowed, not even exclusively, but only "*primarily* to the parents of children attending sectarian, nonpublic schools." *Committee for Public Educ.* v. *Nyquist,* 413 U.S., at 794 (emphasis supplied). *See also id.,* at 804 (Burger, C.J., dissenting); *cf. Meek* v. *Pittenger,* 421 U.S., at 389 (opinion of Rehnquist, J.); *Sloan* v. *Lemon,* 413 U.S., at 830. The case against this statute and guideline is even stronger. The *sole* beneficiaries of the "religious accommodation" scheme are those who espouse religious views—other interests go unprotected. To paraphrase Mr. Justice Brennan, religious concerns are "injected" into a non-religious context, and religious activity is "promoted"—not just "specially," but to the exclusion of any other.

Cf. Walz v. *Tax Commission,* 397 U.S., at 689 (Brennan, J., concurring).

The very "narrowness of the . . . class . . . benefited" by the "accommodation" provisions underscores that the primary impact of this scheme is forbidden religious advancement. *Cf. Committee for Public Educ.* v. *Nyquist,* 413 U.S., at 794. Even more than state tuition grants to parents of children in private sectarian schools—grants declared unconstitutional in *Committee for Public Educ.* v. *Nyquist, supra,* and in *Sloan* v. *Lemon, supra*—the "accommodation" provisions confer special benefits on a class of persons determined strictly on religious grounds.

In sum, it cannot be said that the "accommodation" provisions are either "evenhanded in operation" or "neutral in primary impact." *Gillette* v. *United States,* 401 U.S., at 450. Rather, "an exception from a general obligation of citizenship on religious grounds [has] . . . run afoul of the Establishment Clause. . . ." *Wisconsin* v. *Yoder,* 406 U.S. 205, 220-21 (1972).

3. *The "Religious Accommodation" Provisions Foster Divisive Entanglement of Governmental and Religious Activity*

The "entangling" influence of the 1972 amendment and the EEOC guideline manifests itself in a two-step process. *First,* the concept of "religious belief" which qualifies for protection under the "accommodation" provisions is necessarily broad and far-reaching. The 1972 amendment speaks not simply of "religion," but of "*all aspects* of religious observance and practice, as well as belief." Section 701(j), 42 U.S.C. § 2000e

(j) (emphasis supplied). The "indeterminate scope" of the statutory provision enhances the dangers of entanglement. *Gillette* v. *United States,* 401 U.S., at 458. For " 'the more . . . complicated the basis of classification for an exemption—even a neutral one—the greater the potential for state involvement' in determining the character of persons' beliefs and affiliations, thus 'entangl[ing] government in difficult classifications of what is or is not religious.' " *Gillette* v. *United States,* 401 U.S., at 457, relying upon *Walz* v. *Tax Commission,* 397 U.S., at 698-99 (opinion of Harlan, J.).[18]

Second, the breadth of the "religious accommodation" provisions leads inevitably to extensive review, first by the EEOC and then by the courts, of every phase of the employee's religious claim—the activities of his religious sect, the manifestations of that sect's beliefs, and the *bona fides* of the employee who seeks relief under the statute. As the Court said in *Gillette,*

> "To view the problem of fairness and even-handed decisionmaking . . . as merely a commonplace chore of weeding out 'spurious claims,' is to minimize substantial difficulties of real concern to a responsible legislative body." 401 U.S., at 456.

Indeed, Senator Randolph contemplated—and endorsed—precisely such involvement, as witnessed by the colloquy accompanying his introduction of the 1972 amendment:

> "Mr. Dominick. Am I correct in understanding that the amendment allows *flexibility* both to the EEOC and to its investigators to determine whether or not any particular group of religious adherents are having their customary observance of their religious activities unduly interfered with? In *other words, flexibility is provided so that someone could make a discretionary judgment on it?*
>
> "Mr. Randolph. The Senator from Colorado correctly follows me in the thinking that I have placed in the language of the amendment that *there would be such flexibility,* there would be this approach of understanding, *even perhaps of discretion,* to a very real degree." 118 Cong. Rec. 706 (1972) (emphasis supplied).

Such "flexible" and "discretionary" bureaucratic judgment will inevitably give rise to the danger of "erratic decisionmaking" which this Court has previously identified as a primary source of improper entanglement. *Gillette* v. *United States,* 401 U.S., at 458.

Judge Celebrezze foresaw the dangers of entanglement posed by the "accommodation" scheme:

> "Disposition of complaints under the [1972] amendment will require inquiry into the sincerity with which beliefs are held and force consideration of the validity of the religious nature of claims, procedures which are not favored and may themselves be improper because they put courts in review of religious matters." 516 F.2d, at 559 (Pet. 54a) (footnote omitted).

Here, the entanglement takes on the added vice that the employee who claims a religiously motivated exemption from the work rules of his employer is permitted by the "accommodation" scheme to assert his

[18] *Cf. Presbyterian Church* v. *Mary Elizabeth Blue Hull Church,* 393 U.S. 440 (1969).

professed religious beliefs as a sword levelled against his work-related obligations. This point alone differentiates the "conscientious objector" provisions of the Selective Service acts and this Court's decisions arising thereunder, notably *Gillette* v. *United States, supra*: there the claim of exemption has been raised as a shield, in defense to criminal prosecutions for refusal to submit to induction. To like effect is *Wisconsin* v. *Yoder, supra,* where Amish parents were subjected to criminal prosecution when they withdrew their children from the public schools.

The entanglement which can be expected under these provisions has already surfaced in this case. The Kentucky state commission inquired into the Friday-sundown-to-Saturday-sundown practices of the World Wide Church of God (R. 37, 42, 51-52), its holy days (R. 39-40), the length of its Saturday services (R. 40), and the Church's expectations of observance on the part of its membership (R. 38, 45, 47)—all requiring testimony of Cummins' minister. Extensive inquiry was also directed at the *bona fides* of Cummins' professed beliefs—his asserted unwillingness to respond to the repeated suggestions of his plant manager that he substitute for his overworked fellow supervisors (R. 185); his reluctance to take over for an ailing colleague except when pressured by a fellow employee (R. 183-84); and his disinclination to get to work early, even when the men he was supposed to be supervising were required to do so (R. 177). To the extent that facts such as these give rise to questions about the *bona fides* of an employee's claim to preferred treatment, "we must also recognize that 'sincerity' is a concept that can bear only so much adjudicative weight." *Gillette* v. *United States,* 401 U.S., at 457. *Cf. Hansard* v. *Johns-Manville Prods. Corp.,* 5 E.P.D. ¶ 8543, at 7561-62 (E.D. Tex. 1973).

Moreover, the affirmative evil engendered by entanglement—"that kind and degree of government involvement in religious life that, as history teaches us, is apt to lead to strife," *Walz* v. *Tax Commission,* 397 U.S., at 694 (opinion of Harlan, J.)—is demonstrably present on this record. Under compulsion of federal law, a private employer has required supervisory personnel to assume the duties that should have been borne by one of their brethren, who claimed, in effect, a religious exemption from work. The court below dismissed their resentment as mere grumbling; but to the man on the scene, it presented a severe managerial problem. There is no denying that the "religious accommodation" scheme has fostered divisiveness in the industrial plant.[19]

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[19] We recognize that in the view of Mr. Justice Brennan, the Establishment Clause forbids

> ". . . those involvements of religious with secular institutions which (a) serve the essentially religious activities of religious institutions; (b) employ the organs of government for essentially religious purposes; or (c) use essentially religious means to serve governmental ends, where secular means would suffice." *Lemon* v. *Kurtzman,* 403 U.S., at 643 (separate opinion); *Walz* v. *Tax Commission,* 397 U.S., at 680-81 (concurring); *Abington School Dist.* v. *Schempp,* 374 U.S., at 295 (concurring).

For the reasons set forth at length above, the "religious accommodation" provisions violate each element of this three-part test as well. *First,* the effect and purpose of this scheme conjoin to serve an essentially religious end, particularly of those religious institutions which observe the Sabbath other than on Sunday; indeed, no other explanation is rationally present. *Second,* the force of the federal government—through the mediating offices of the EEOC and then through the power of the courts—is brought to bear in support of the religious objectives of the "accommodation" [Footnote continued on next page.]

C. The "Religious Accommodation" Scheme Is Not Required to Preserve the Free Exercise Rights of Employees

It is urged that the 1972 amendment and the 1967 guideline can somehow be justified as an implementation of the free exercise of religious belief guaranteed by the First Amendment.[20] Entirely apart from the fact that Congress did not enact Title VII to implement the Bill of Rights,[21] this argument is unavailing.

First, the Constitution does not require the private employer to assure the free exercise of his employees' religions. As Judge Learned Hand put it in *Otten* v. *Baltimore & Ohio R.R.,* 205 F.2d 58, 61 (2d Cir. 1953):

> "The First Amendment protects one against action by the government . . . but it gives no one the right to insist that in the pursuit of their own interests others must conform their conduct to his own religious necessities. . . . We must accommodate our idiosyncrasies, religious as well as secular, to the compromises necessary in communal life; and we can hope for no reward for the sacrifices this may require beyond our satisfactions from within, or our expectations of a better world."

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scheme. *Third,* the "accommodation" scheme is designed purportedly to curtail religious discrimination in private employment—an end which may be obtained by enforcement of Title VII as originally enacted in 1964.

[20] *E.g., Jordan* v. *North Carolina Nat'l Bank,* 399 F. Supp. 172, 179-80 (W.D.N.C. 1975).

[21] *See, e.g.,* Edwards & Kaplan, *supra,* pp. 29-30, at 603 & n.25.

For purposes of First Amendment analysis, Parker Seal cannot be equated with a sovereign State or with the Federal Government.[22] This point alone differentiates *Sherbert* v. *Verner,* 374 U.S. 398 (1963), where South Carolina denied unemployment benefits to a Seventh Day Adventist who refused to work on Saturdays. *See Dewey* v. *Reynolds Metals Co.,* 429 F.2d, at 329.[23]

Second, even if a free-exercise interest were present here, Establishment Clause considerations would still prevail. It surely comes as no surprise to find the two provisions in conflict:

> "[T]his Court repeatedly has recognized that tension inevitably exists between the Free Exer-

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[22] Indeed, the requisite "state action" is wanting even where the employer's action is founded upon a federally sanctioned union-shop provision in the collective-bargaining agreement. *Linscott* v. *Millers Falls Co.,* 440 F. 2d 14, 19-20 (1st Cir.) (Coffin, J., concurring), *cert. denied,* 404 U.S. 872 (1971).

[23] *Sherbert* is additionally distinguishable in that the South Carolina statutory scheme there at issue affirmatively discriminated against Saturday worship. South Carolina law "expressly save[d] the Sunday worshipper from having to make the kind of choice [between religious belief and employment]" which this Court held violative of Sherbert's religious liberty. Under South Carolina law, no employee could be required to work on Sunday "who is conscientiously opposed to Sunday work"; employers were forbidden to take action against employees who invoked their rights under this statute. *See* 374 U.S., at 406. Here, by contrast, on the occasions that the Berea plant did operate on Sunday, supervisors were required to work even when Sunday was their Sabbath (R. 147, 161). Moreover, the loss of unemployment benefits and consequent "absolute destitution" in *Sherbert* worked a far more severe hardship on the appellant there than does Cummins' obligation to seek out employment that does not require Saturday work—employment which he has found (R. 53, 103). *Cf. Linscott* v. *Millers Falls Co.,* 440 F.2d, at 18.

> cise and the Establishment Clauses . . . and that it may often not be possible to promote the former without offending the latter. As a result of this tension, our cases require the State to maintain an attitude of 'neutrality,' neither 'advancing' nor 'inhibiting' religion." *Committee for Public Educ.* v. *Nyquist*, 413 U.S., at 788 (citation and footnote omitted).

To the extent a "balancing" is called for to locate the midpoint of neutrality, the "advancement" of religion unlawfully compelled by the "accommodation" scheme surely poses a greater threat to First Amendment values than does any "inhibition" that might theoretically result from abrogation of the statutory scheme. For it must be borne in mind, as Judge Celebrezze noted in dissent below, 516 F.2d, at 559-60 (Pet. 55a), that the original proscription of religious discrimination contained in Title VII will remain in full force if the "religious accommodation" provisions are invalidated. There is thus no occasion to consider whether the values of the First Amendment must be "zealously protected, sometimes even at the expense of other interests of admittedly high social importance," *Wisconsin* v. *Yoder*, 406 U.S., at 214—those interests remain fully protected.[24]

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[24] It merits emphasis that even nonconstitutional interests have often overcome Free Exercise values. Thus, this Court has recognized that the State's interest in the public health and safety outweighs individual objections founded upon claims to religious liberty. Such interests embrace not only the inoculation of children against disease, *Jacobson* v. *Massachusetts*, 197 U.S. 11 (1905), and the regulation of their labor, *Prince* v. *Massachusetts*, 321 U.S. 158 (1944), but also the State's insistence upon monogamous marital relations, *Davis* v. *Beason*, 133 U.S. 333 (1890); *Reynolds* v. *United States*, 98 U.S. 145 (1878), or compulsory "military science" courses, *Hamilton* v. *Regents of Univ. of California*, 293 U.S. 245 [Footnote continued on next page.]

II. The Court of Appeals Misconstrued the Statute and Guideline in Concluding That Parker Seal Did Not Satisfy Its Obligation To Attempt an Accommodation with Cummins

For over a year, Parker Seal went to exceptional lengths to meet the demands occasioned by Cummins' professed religious beliefs. Even without regard to the constitutional issues in this case, Parker Seal's efforts surely satisfied its obligations under any reasonable reading of the "religious accommodation" provisions of Title VII.[25] The decision of the court of appeals to the contrary was based largely on its use of those efforts *against* Parker Seal, as evidence that continued accommodation could not have caused the company undue hardship. The court below compounded its error by placing on Parker Seal a burden that was entirely unreasonable, especially when viewed in light of the relevant constitutional considerations.[26]

(1934). In sum, ever "[s]ince the *Reynolds* case it has been recognized that religious practices are subject to reasonable *government* interference under certain conditions and circumstances." *Dawson* v. *Mizell*, 325 F. Supp. 511, 514 (E.D. Va. 1971) (Merhige, J.) (emphasis supplied). No less should be true of legitimate, uniformly applied work rules adopted by private employers.

[25] We advance the following analysis without prejudice to Parker Seal's contention that, however construed, the "accommodation" scheme cannot pass muster under the Establishment Clause—a contention addressed in Part I of this brief. Indeed, given this Court's past decisions which interpret that Clause, we are not confident that any construction of the statute which leaves a burden upon the employer to accommodate his employees' religious needs (as opposed to an obligation not to discriminate against them on the basis of their religion) can survive constitutional scrutiny.

[26] Undoubtedly, the court of appeals should have attempted to construe the "accommodation" scheme so as to avoid the constitutional questions now presented. *United States* v. *Seeger*, 380 U.S. [Footnote continued on next page.]

A. The Court of Appeals Erred in Taxing Parker Seal for Its Past Efforts at Accommodation

It may be that the employer who fails to attempt *any* accommodation may be faulted for his unwillingness to make an effort—whether it be "temporary" (even in the face of doubtful permanent success), *Claybaugh* v. *Pac. Northwest Bell Tel. Co.*, 355 F. Supp. 1, 6 (D. Ore. 1973), just an "experiment," *Draper* v. *United States Pipe & Foundry Co.*, 527 F.2d 515, 120 (6th Cir. 1975), or on a "trial basis," *Reid* v. *Memphis Pub. Co.*, 521 F.2d 512, 517 (6th Cir. 1975), *cert. pending*, No. 75-1105. Thus, the employer should be "on stronger ground when he has attempted various methods of accommodation and can point to hardships that actually resulted." *Draper* v. *United States Pipe & Foundry Co.*, *supra*.

That is precisely what Parker Seal did here, to no avail—indeed, as it turned out, to the detriment of its subsequent position in court. A trial effort of more than one year, undertaken in good faith by the company, demonstrated that yielding to Cummins' personal dictates left the Berea Banbury or its adjoining department undermanned one day out of six for each week that the Banbury ran on Saturdays. At the very least, the court of appeals should not have flung in Parker Seal's face the evidence of its past efforts at accommodation as proof of the insubstantiality of its claim under the "accommodation" scheme.

Parker Seal accommodated Cummins for more than a year after he first announced that he would no

163, 188 (1965) (Douglas, J., concurring); *United States* v. *Rumely*, 345 U.S. 41, 47 (1953); *Ashwander* v. *TVA*, 297 U.S. 288, 341, 348 (1936) (Brandeis, J., concurring).

longer work on Saturdays. He was excused from Saturday work; alternative, makeshift arrangements were made for the necessary supervision of the Banbury. Eventually, however, in view of the "economic . . . and supervisory . . . problems" faced by the plant (R. 173), the manager concluded that Cummins "had to be there [on Saturdays] if that department was to function the way it should" (R. 180). Circumstances at the Berea plant had changed from the time Parker Seal initially accommodated Cummins to the time of his discharge.[27] As a result of deteriorating morale and decreasing output, the plant manager who had approved Cummins' absence was replaced, and a successor was brought in to attempt to resolve the "economic . . . and supervisory . . . problems" (R. 173). The new manager told Cummins that "as long as it don't cause any problems," he had no objection to Cummins' Saturday absences (R. 69). But by the summer of 1971, he had concluded that working on scheduled Saturdays was as essential a part of the Banbury first shift supervisor's job as it was that of the men working in the Banbury on that day (R. 180).

The court of appeals turned this evidence of attempted accommodation against Parker Seal. The

[27] Cummins' attitude towards the problem also appears to have changed. When he first informed the plant manager that he would not work on Saturdays, he said he would be willing to help out by working extra hours at any other time (R. 65, 115-16). Later, however, according to the new plant manager, he "made no effort to go down and relieve those other fellows during the week who had to relieve him on Saturdays" (R. 202). The problem was further aggravated by Cummins' refusal to work the same hours during the week as the shift he was supervising, despite company policy to that effect (R. 158, 177).

court rested its decision largely on its professed inability to understand "why an accommodation that was reasonable for over a year . . . suddenly became unreasonable in September 1971." 516 F.2d, at 547 (Pet. 20a). In other words, having once embarked on a good faith effort to determine whether Cummins' supervisory duties could be adequately discharged without his doing the Saturday work required of other employees, Parker Seal could never thereafter assert that its efforts ultimately caused it "undue hardship."

The court of appeals' decision places the employer in an intolerable position. If he refuses to make any effort to accommodate his Sabbatarian employees, he risks liability without more under the statute and guideline. But if, like Parker Seal, he makes an attempt at accommodation which later proves unworkable, the attempt itself may be used against him, as evidence that his claim of "undue hardship" is unfounded. Such a result surely was not intended by the EEOC when it promulgated either version of Guideline 1605.1, nor by Congress when it passed the 1972 amendment to Title VII. By discouraging employers from attempting to work out problems arising from employees' religious convictions, the decision below frustrates the entire purpose of the "religious accommodation" rule. On this ground alone, the judgment of the court of appeals should be reversed.

B. The Record Amply Supports the Conclusion of the District Court That Parker Seal Satisfied Its Statutory Obligations

A number of factors emerge from the decisions of the lower courts which clarify the proper scope of the

employer's obligation under Title VII to accommodate his religiously motivated employees. Whether taken singly or in combination, those elements all support Parker Seal's position on this record, especially in light of the narrow reading which must be accorded the statute given the serious Establishment Clause issues.[28]

—Whether the Complaining Employee Has Attempted Any Accommodation

"Accommodation" connotes a mutuality of effort. The burden of accommodation should not be unilaterally imposed upon the employer; the employee, too, must shoulder some obligations in this regard. Title VII should not be read to "require an employer to impose hardships on its [other] employees, or to bear the financial burden of an employee's religious convictions," especially where the employee seeking preferred treatment has taken an "intransigent position" or has refused to pursue any available avenue of relief within the employer's established system. *United States* v. *City of Albuquerque,* 9 E.P.D. ¶ 10,182, at 7825, 7830 (C.D. Cal. 1975). Thus, the employee who wishes to avoid compulsory overtime on his Sabbath should be willing to find a substitute worker, at least where permitted by his union's collective bargaining agreement. *Cf. Dewey* v. *Reynolds Metals Co.,* 429 F.2d 324 (6th Cir. 1970), *aff'd by equally divided Court,* 402 U.S. 689 (1971); *Riley* v. *Bendix Corp.,*

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[28] As noted above (p. 18, n.10), because the "religious accommodation" provisions add to the obligations already fashioned by the prohibition against discrimination found in the original Title VII, a narrow interpretation of the provisions here at issue will not affect the fundamental statutory ban on discrimination.

330 F. Supp. 583, 585 (M.D. Fla. 1971), *rev'd*, 464 F.2d 1113, 1115 (5th Cir. 1972).[29]

Here, Cummins made no effort whatever to ease the difficulties his professed religious views were causing Parker Seal; according to the testimony of his plant manager, he ignored repeated suggestions that he substitute during the week for his over-worked fellow supervisors who were covering his job on Saturdays.

The court of appeals proposed that Parker Seal might have reduced Cummins' salary commensurately with his shorter hours. 516 F.2d, at 550 (Pet. 29a). However, the court did not explain how that step would have reduced the burden on Cummins' fellow supervisors (who would still have been required to substitute for him on Saturdays), nor how it would have improved the efficiency of the Banbury department. Moreover, Cummins never offered to take a pay cut (R. 101). It is accordingly unclear why such a reduction in pay would not have been subject to a subsequent challenge by Cummins based upon the statutory prohibition against discrimination in compensation. Section 703(a)(1), 42 U.S.C. § 2000e-2(a)(1).

—Whether the Job Requires an Unusual Degree of Specialization or Flexibility

An employer surely is entitled to consideration where the job at issue calls for "specialists . . . not

[29] *See also Williams* v. *Southern Union Gas Co.*, 529 F.2d 483, 488 (10th Cir. 1976) (sufficient advance notice of intended absence required to enable employer to make suitable alternative arrangements), *cert. pending*, No. 75-1511.

readily interchangeable," and where the employer thus faces difficulty in finding available substitutes. *Reid* v. *Memphis Pub. Co.*, 521 F.2d, at 515 (newspaper copy editors); *cf. Dixon* v. *Omaha Public Power Dist.*, 385 F. Supp. 1382, 1386 (D. Neb. 1974) (electric-line maintenance and repair).

Similarly, the job position at issue may call for "truly a flexible employee, available whenever needed." *Johnson* v. *United States Postal Service*, 497 F.2d 128, 130 (5th Cir. 1974), *aff'g* 364 F. Supp. 37 (N.D. Fla. 1973) (part-time mail clerk covering other employees on vacation, leave, or out sick). Or, as here, it may involve a foreman—an "essential employee" as to whom "it is not difficult to understand how leaving [the] . . . job in the middle of the shift would have its effect upon the work. . . ." *Riley* v. *Bendix Corp.*, 330 F. Supp., at 590, *rev'd*, 464 F.2d 1113 (5th Cir. 1972). The EEOC similarly has recognized that the absence of employees who occupy key positions in the business operation may result in severe economic hardship to the employer. EEOC Dec. No. 70-773, CCH EEOC Dec. ¶ 6154 (1970).

As a plant supervisor, Cummins had substantial responsibility for the operation of a department and the men working under him (R. 56, 205). He was deemed a "part of management" (R. 79). The nature of his responsibilities, like those of his fellow supervisors, required his presence whenever his men were on the job—a point of sufficient importance that the new plant manager put out a memorandum restating company policy on this subject when he arrived in Berea (R. 158).

—Whether the Nature of the Employer's Business Limits the Opportunity for Alternative Avenues of Accommodation

The courts should consider whether the employer's operations permit the adjustment needed to meet the religious needs of individual employees. Employers such as Parker Seal which operate "job type" plants, producing on order to customer specifications, must schedule production to meet stipulated delivery dates. *Cf. Dewey* v. *Reynolds Metals Co.*, 429 F.2d, at 328. In such circumstances, there may well be less room for play at the joints.

Cummins' position with Parker Seal required his availability in response to customer orders, which had to be met on a short lead-time (R. 100, 220). That necessary responsiveness on the part of the Berea operation as a whole often required operation of Cummins' department on Saturdays, as Cummins knew (R. 231). Parker Seal was surely entitled to take these facts into consideration in responding to Cummins' demand for regular Saturday absences.

—Whether a Pool of Fellow Employees Is Readily Available To Serve as Substitute Workers

The employer with large numbers of similarly situated employees may have less cause to object to an obligation to accommodate than one whose labor pool provides fewer substitutes. Thus, a telephone company with 150 toll transmission men statewide was said to have erred in failing to seek out a transfer for a lineman willing to relocate to a position where his religious needs could be accommodated. *Claybaugh* v. *Pac. Northwest Bell Tel. Co.*, 355 F. Supp., at 5. *See*

also Hardison v. *Trans World Airlines, Inc.*, 527 F.2d 33, 39 (8th Cir. 1975), *rev'g* 375 F. Supp. 877 (W.D. Mo. 1974), *cert. pending*, No. 75-1126, 75-1385 (200 employees said to be able to perform work in question). Conversely, "in very small offices and enterprises . . . the shifting of one employee . . . may cause very real hardship to an employer." *Shaffield* v. *Northrop Worldwide Aircraft Services, Inc.*, 373 F. Supp. 937, 941 (M.D. Ala. 1974) (dictum); *cf. Johnson* v. *United States Postal Service*, 364 F. Supp., at 42. And even the large employer should be able to point out that the aggrieved employee is "the only person performing his particular job on his shift during the weekend" in a continuously operating department which supplies parts company-wide. *Hardison* v. *Trans World Airlines, Inc.*, 375 F. Supp., at 891, *rev'd*, 527 F.2d, at 39; *cf. Johnson* v. *United States Postal Service*, 497 F.2d., at 129-30; *Roberts* v. *Hermitage Cotton Mills*, 8 E.P.D. ¶9589, at 5552 (D.S.C.), *aff'd*, 8 E.P.D. ¶9597 (4th Cir. 1974); *Drum* v. *Ware*, 7 E.P.D. ¶9244, at 7162 (W.D.N.C. 1974) (local post office had only six regular letter carriers; plaintiff agreed to transfer to Charlotte area, where Postal Service employed 1500 people).

Here, Parker Seal's Berea operation employed some 600 people (R. 132). Only 17 of those were supervisors at Cummins' level of employment (R. 186). The Berea plant manager either required one of them to substitute for Cummins on each Saturday the Banbury department was in operation, or directed the Stock Prep Supervisor to double up on his Saturday responsibilities. Although the court below thought that Parker Seal could have required Cummins to substitute for his colleagues during the week, 516 F.2d, at

550 (Pet. 20a-30a), this would have been impossible under normal working conditions to the extent that substitute supervisors were already working on the same shift as Cummins (R. 198). Moreover, the issuance of orders at this level was contrary to the plant manager's overriding objective of inculcating a sense of participatory responsibility among his supervisory staff (R. 183-86).

—Whether Replacement Is Sought on a Regular or Infrequent Basis

It is one thing for an employee to seek relief once a month to attend religious meetings. *Weitkenaut* v. *Goodyear Tire & Rubber Co.*, 381 F. Supp. 1284, 1286 (D. Vt. 1974). It is something else again when the employee demands relief from all work assignments once every week, from sundown on Friday to sundown on Saturday. In a six-day-a-week plant, that demand can cut across a number of working shifts. The weekly disruption of supervision in the Banbury department occasioned by Cummins' Saturday absences amounted to more than the occasional employee request for time off in support of a special religious holiday.

—Whether Accommodation Will Result in Lost Efficiency and Other Costs to the Employer

The employer must be heard to raise the objection that satisfaction of the aggrieved employee's religious demands will require the juggling of work schedules, the imposition of extra time upon other employees, or the incurrence of overtime expense. *Cf. United States* v. *City of Albuquerque*, 9 E.P.D., at 7830; *Dixon* v. *Omaha Pub. Power Dist.*, 385 F. Supp., at 1386. *But cf. Ward* v. *Allegheny Ludlum Steel Corp.*, 397 F.

Supp. 375, 377 (W.D. Pa. 1975), *appeal pending* (3d Cir.).[30] Moreover, even if employee "grumbling" alone does not suffice to bar accommodation, *see Draper* v. *United States Pipe & Foundry Co.*, 527 F.2d, at 520; *Cummins* v. *Parker Seal Co.*, 516 F.2d, at 550 (App. 29a), it is difficult to accept the view of the court below that personnel problems must reach the level of "chaos" before they may legitimately be taken into account. The employer surely must be entitled to take into account "a serious morale problem" short of plant disruption. *Reid* v. *Memphis Pub. Co.*, 521 F.2d, at 516.

Here, three members of Parker Seal's management testified that Cummins' absence on Saturdays adversely affected the operations of his department (R. 131, 180, 228). Even the plant manager who had first approved Cummins' absence on Saturdays believed that oversight of the Banbury department's first shift by the supervisor of the neighboring department was "absolutely not" good operating procedure, and that the situation could not be allowed to continue indefinitely (R. 124-25, 129). In the opinion of that manager's successor, Cummins simply "had to be there [on Saturdays] if that department was to function the way it should" (R. 180).

In alleviation of the foregoing burdens upon Parker Seal, the court below suggested that Cummins might have been required to work on Sundays instead of Saturdays. 516 F.2d, at 550 (Pet. 29a). But because of the doubletime rates provided in the union contract, the Banbury rarely operated on Sundays; when-

[30] The safe operation of the business is also a relevant consideration. *Draper* v. *United States Pipe & Foundry Co.*, 527 F.2d, at 521.

ever it did, Cummins was already there (R. 63, 109, 135, 198). It is difficult to see what benefit either the company or Cummins would have derived from his supervision of a deserted department on the Sundays that the plant did not operate.

—Whether the Employer's Financial Condition and Prospects Can Sustain Additional Burdens

Other courts have not overlooked the "strict manning and budgetary limits" under which an employer may have to operate. *United States* v. *City of Albuquerque,* 9 E.P.D., at 7830 (city fire department). The court below improperly ignored that factor here. Although its opinion was silent on the subject, the record before the Kentucky Commission and the district court reflected the undisputed testimony that the profitability of the Berea operation had deteriorated so seriously in recent years that a new plant manager had been brought in with a view either to straightening out the operation or to closing it down (R. 173). Already, large numbers of employees had been let go (R. 208). In particular, the Banbury operation was a source of continuing concern, with productivity little more than half that of a comparably situated nearby plant (R. 131, 175, 218-19). The new manager was operating under directives to improve performance—specifically, to "solicit and to . . . insist" not only on "longer hours," but also "more personal interest [and] more involvement on the part of the Supervision" as well (R. 210). This was the context in which the Berea plant manager finally determined that he could no longer afford the added operating burdens in the Banbury department and on his supervisory staff which were created by Cummins' continual absences.

—Whether the Hardship Will Fall on Fellow Employees

Even if the employer has a duty to inquire whether other employees are willing to exchange shifts with the aggrieved religionist, *e.g., Claybaugh* v. *Pac. Northwest Bell Tel. Co.,* 355 F. Supp., at 5, there remains a serious question whether he must compel such employees to accept added burdens. Several courts have refused to sanction such forced accommodation at other employees' expense. *E.g., Williams* v. *Southern Union Gas Co.,* 529 F.2d, at 489 (supervisor forced to delay vacation); *Reid* v. *Memphis Pub. Co.,* 521 F.2d, at 516 (senior copyreaders would have had to come in on Saturdays); *Kettell* v. *Johnson & Johnson,* 337 F. Supp. 892, 894 (E.D. Ark. 1972); *United States* v. *City of Albuquerque,* 9 E.P.D., at 7830; *Drum* v. *Ware,* 7 E.P.D. ¶ 9244, at 7162 (continued requirement of Saturday substitution for full-time letter carrier worked undue hardship).

For over a year, Parker Seal required Cummins' fellow supervisors to cover his department, at no increase in pay to them, and even though there came a time when they were bearing a workload nearly twice that of Cummins (R. 140, 146, 150, 156, 176). Only when the other supervisors took the extraordinary step of complaining to the plant manager did he urge Cummins to reconsider his position (R. 71, 175). In response to this history of accommodation by Parker Seal and its supervisory staff to Cummins' religious dictates, the court below lightly—and, we submit, improperly—dismissed the complaints of Cummins' fellow workers as mere employee grumbling. 516 F.2d, at 510 (Pet. 28a-29a).

—Whether the Employer's Obligations to Third Parties Permit the Demanded Accommodation

Often an employer's freedom of action in seeking to accommodate an employee's religious views is circumscribed by his pre-existing agreements with others —most notably, a collective bargaining agreement with the union. *Cf. Shaffield* v. *Northrop Worldwide Aircraft Services, Inc.,* 373 F. Supp., at 942. The courts have left it unclear whether under the "accommodation" scheme the employer need do more than consult with the union representative with a view to seeking a voluntary waiver of pertinent provisions. *Hardison* v. *Trans World Airlines, Inc.,* 527 F.2d, at 41-42; *Shaffield* v. *Northrop Worldwide Aircraft Services, Inc.,* 373 F. Supp., at 942; *Claybaugh* v. *Pac. Northwest Bell Tel. Co.,* 355 F. Supp., at 6; *Dawson* v. *Mizell,* 325 F. Supp. 511, 513 (E.D. Va. 1971). Some courts have rejected the notion that the employer must go further, and somehow override or ignore the agreement at the behest of the religiously motivated individual employee. *Hardison* v. *Trans World Airlines, Inc.,* 527 F. 2d, at 43 (question reserved); *Reid* v. *Memphis Pub. Co.,* 521 F.2d, at 516; *Johnson* v. *United States Postal Service,* 497 F.2d, at 129 (no duty to override); *Dawson* v. *Mizell,* 325 F. Supp., at 513-14 (no duty on part of Postal Service to violate agreement governing 700,000 workers).

In this case, a collective bargaining agreement with the union precluded Parker Seal from demoting Cummins to a lower level in the work force from his supervisory position (*see* R. 72, 99). Further, even though Cummins' fellow supervisors, like Cummins himself, were not covered by the terms of that agree-

ment, Parker Seal surely had obligations to them as well—notably, an obligation not to impose upon them burdens of supervisory responsibility far beyond those which Cummins was willing to accept.

* * *

In sum, Parker Seal complied with its statutory obligations. Whether the test be one of the "undue" character of the burden Parker Seal would otherwise have had to bear, or the "reasonableness" of its attempts at accommodation, the outcome is the same— Parker Seal strove abundantly to meet Cummins' religious demands. Indeed, short of an abdication of responsibility for the operation and profitability of a marginal industrial plant, Parker Seal's Berea manager could hardly have attempted more to alleviate the burdens under which Cummins professed to labor. Thus, especially when viewed in the light of the constitutional considerations addressed in the first section of this brief, Parker Seal must be said to have satisfied its obligations to Cummins under Title VII.

CONCLUSION

For the foregoing reasons, Parker Seal Company, the petitioner, respectfully submits that this Court should reverse the judgment of the court of appeals below, and should remand with instructions to reinstate the judgment of the district court dismissing Cummins' complaint.

Respectfully submitted,

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